



FOIA Request
Keith Gates to: FOIA HQ

RECEIVED
SEP 12 2011

09/09/2011 05:14 PM

Dear Larry,

10-FOI-00306-12

Today, the Freedom Through Justice Foundation sent a FOIA request to your offices by U.S. mail. For purposes of expediting the request, we have attached the letter herein.

J. Keith Gates

Sr. Attorney

Freedom Through Justice Foundation

Ph: (703) 875-8625

keith.gates@ftjfoundation.org



FTJ to EPA FOIA Letter RFA Compliance (9 9 2011).pdf

Freedom Through Justice Foundation

2111 Wilson Blvd #700

Arlington, VA 22201

703.875.8625

RECEIVED
SEP 12 2011

September 9, 2011

VIA FIRST CLASS MAIL & EMAIL

10-F01-00306-12

OMP
AWT

Larry Gottesman
National Freedom of Information Officer
Environmental Protection Agency
(28221)
1200 Pennsylvania Avenue, NW
Washington, DC 20460
hq.foia@epa.gov

Re: Freedom of Information Act Request

Dear Sir:

We write on behalf of the Freedom Through Justice Foundation, a 501(c)(3) nonprofit corporation that uses public policy and legal reform strategies to ensure greater transparency in government, protect taxpayer interests and promote social and economic freedoms. We are concerned that many governmental agencies may not be in compliance with the Regulatory Flexibility Act and seek information concerning your agency's compliance with the RFA.

As you know, the RFA was enacted to "establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation."¹ Further, Congress declared that in order to "achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration."²

Unfortunately, many governmental agencies failed and continue to fail to abide by the Act's standards and procedures and continue to promulgate regulations without adequately considering the impact on small businesses.³ Just this year the Court of Appeals for the District of Columbia Circuit invalidated a rule promulgated by the Securities and Exchange Commission, holding that the Commission:

[A]cted arbitrarily and capriciously for having failed once again — as it did most recently in *American Equity Investment Life Insurance Company v. SEC*, 613 F.3d 166, 167–68 (D.C. Cir. 2010), and before that in *Chamber of Commerce*, 412 F.3d at 136 — adequately to assess the economic effects of a new rule.

¹ Regulatory Flexibility Act of 1980, Pub. L. no. 96-354, 94 Stat 1164 (1980).

² *Id.*

³ See e.g. *Northwest Mining Association v. Babbitt*, 5 F.Supp. 2d 9 (D.D.C. 1998); *North Carolina Fisheries Association, Inc. v. Daley*, 27 F. Supp. 2d 650 (E.D. Va. 1998); *Southern Offshore Fishing Association v. Daley*, 55 F. Supp. 2d 1336 (M.D. Fla. 1999).

Business Roundtable v. SEC, ___ F.3d ___, p.7 (D.C. Cir., 2011). The D.C. Circuit, in evaluating SEC provisions similar to the RFA, found,

[T]he Commission inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters.

Id.

The Freedom Through Justice Foundation seeks information regarding the EPA's policies and procedures on implementing the provisions of the RFA, as well as specific measures the EPA has taken to comply with the analysis required under the Act.

Thus, pursuant to the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, the Freedom Through Justice Foundation hereby requests that the EPA produce the following within twenty (20) business days:

1. Any and all documents or materials whatsoever maintained by your Agency which set forth policies, procedures and guidance on the preparation and publication of initial and final regulatory flexibility analyses as required by the Regulatory Flexibility Act, as amended (5 U.S.C. §§ 603 and 605).
2. Any and all calendar entries for the period of January 1, 2010 through the present of Agency representatives, employees, or staff regarding meetings held wherein the impact of proposed regulations on small entities, as defined by 5 U.S.C. § 601 (hereinafter "small entities"), was discussed.
3. Any and all correspondence, including electronic mail, U.S. mail, and facsimiles, between Agency representatives, employees, or staff and representatives, employees, or staff from other governmental entities regarding the impact of proposed regulations on small entities for the period of January 1, 2010 through the present.
4. Any and all voice messaging records including but not limited to caller message recordings, digital voice recordings, interactive voice response unit (IVR/VRV) recordings, unified messaging files, and computer-based voice mail files to or from Agency representatives, employees, or staff which reference or discuss the impact of proposed regulations on small entities for the period of January 1, 2010 through the present.
5. Any and all documents or materials which set forth the entities or persons, whether governmental or non-governmental, who were contacted by Agency

Mr. Larry Gottesman
September 9, 2011
Page 3

representatives, employees, or staff regarding the impact of proposed regulations on small entities during the period of January 1, 2010 through present.

We call your attention to President Obama's January 21, 2009 Memorandum concerning the Freedom of Information Act, in which he states:

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA. . . . The presumption of disclosure should be applied to all decisions involving FOIA.

If any responsive record or portion thereof is claimed to be exempt from production under FOIA, please provide sufficient identifying information with respect to each allegedly exempt record or portion thereof to allow us to assess the propriety of the claimed exemption. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). In addition, any reasonably segregable portion of a responsive record must be provided, after redaction of any allegedly exempt material. 5 U.S.C. § 552(b).

Freedom Through Justice Foundation is entitled to a complete waiver of both search fees and duplication fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii).

In an effort to facilitate record production within the statutory time limit, the Freedom Through Justice Foundation prefers to accept documents in electronic format (e.g. e-mail, .pdfs). When necessary, the Freedom Through Justice Foundation will accept the "rolling production" of documents.

If you do not understand this request or any portion thereof, or if you feel you require clarification of this request or any portion thereof, please contact us immediately at (703) 875-8625 or by email at Keith.Gates@ftjfoundation.org. We look forward to receiving the requested documents and a waiver of both search and duplication costs within twenty (20) business days. Thank you for your cooperation.

Very truly yours,



J. KEITH GATES
SENIOR ATTORNEY

Encl.

Responding to Document Requests

1. In complying with this request, you should produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Freedom Through Justice Foundation.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Freedom Through Justice Foundation's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. When you produce documents, you should identify the paragraph in the Freedom Through Justice Foundation's request to which the documents respond.
5. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.
6. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Freedom Through Justice Foundation staff to determine the appropriate format in which to produce the information.
7. If compliance with the request cannot be made in full, compliance shall be made to the extent possible and shall include an explanation of why full compliance is not possible.
8. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
9. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and

recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.

10. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.
11. The time period covered by this request is included in the attached request. To the extent a time period is not specified, produce relevant documents from January 1, 2009 to the present.
12. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.
13. All documents shall be Bates-stamped sequentially and produced sequentially.

Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmation, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email, regular mail, telexes, releases, or otherwise.
3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.